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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE ex rel. JOSEPH TIPALDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND MOTION TO ADVANCE

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HENRY EPSTEIN,
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INDEX

	PAGE
Petition for Writ of Certiorari	3
Questions Presented	4
Statement of Facts	5
Reasons for Writ	8
Brief in Support of Petition	10–26
A. Opinions Below	10
B. Jurisdiction	11
C. Facts	12
D. Assignments of Error	12
E. Summary of Argument	14
Argument	16–26
Appendix	
A. Statute, Chapter 584, Laws 1933	27
B. Opinions of Courts Below	
1. Supreme Court	43
2. Court of Appeals	52
C. Order of Court of Appeals and Judgment Therein	83–87
Motion to Advance	88–90

Citations

Abie State Bank v. Byran, 282 U. S. 765	23
Adkins v. Children's Hospital, 261 U. S. 525	11 12, 16, 19, 22, 23
Atkin v. Kansas, 191 U. S. 207/223	24
Block v. Hirsh, 256 U. S. 135	23
Borden's Farm Products Co. v. Baldwin, 293 U. S. 194	23
Borden's Co. v. Ten Eyck, Decided Jan. 1936 U. S. Sup. Ct.	19
Bunting v. Oregon, 243 U. S. 426	19
Central Lumber Co. v. South Dakota, 226 U. S. 157	25
Chastleton Corp. v. Sinclair, 264 U. S. 543	23
Chicago etc. Ry. Co. v. Wellman, 143 U. S. 339/346	20

PAGE

German Alliance Ins. Co. v. Lewis, 233 U. S. 389/417 25
Griffith v. Connecticut, 218 U. S. 563..... 25
Highland v. Russell Car etc. Co., 279 U. S. 253/262 .....20, 25
Holden v. Hardy, 169 U. S. 366.....20, 23, 25
Hurtado v. California, 110 U. S. 516..... 23
Jacobson v. Massachusetts, 197 U. S. 11.... 21
Matter of Helfrick v. Dahlstrom Metallic Door Co., 256 N. Y. 199; 284 U. S. 594.... 17
McCulloch v. Maryland, 4 Wheat 316/431.... 24
McLean v. Arkansas, 211 U. S. 539.....20, 24
Missouri Pac. R. R. Co. v. Norwood, 283 U. S. 249 23
Mugler v. Kansas, 123 U. S. 623..... 24
Muller v. Oregon, 208 U. S. 412/420, 421.... 21
Nebbia v. New York, 291 U. S. 502.....19, 21, 24
N. Y. Central & H. R. R. Co. v. Williams, 199 N. Y. 108..... 25
O'Gorman & Young v. Hartford Ins. Co., 282 U. S. 251 .....19, 24
Radice v. New York, 264 U. S. 292.....19, 20, 25
Riley v. Massachusetts, 232 U. S. 671..... 25
Stettler v. O'Hara, 243 U. S. 629..... 25
Texas etc. R. R. Co. v. Railway Clerks, 281 U. S. 548 25

Statutes

Laws of New York 1933, Chapter 584.....11, 12 13, 14, 15, 16, 22, 23, 25
Labor Law New York State, Art. 19..... 61
District of Columbia Act of 1918, Chap. 174; 40 Stat. 964..... 16
Judicial Code of U. S., Sec. 27-(b); (28 U. S. C. A. Sec. 344)..... 11

Constitutional Provisions

United States Constitution, Fourteenth Amendment 11, 21

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FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the honorable chief justice and associate justices of the Supreme Court of the United States:

The above named Frederick L. Morehead, as the Warden of the City Prison of the Borough of Brooklyn, petitioner herein, prays for a writ of certiorari to review the order and decision of the Court of Appeals of the State of New York, being the court of last resort of that State, reversing a final order of the Supreme Court of the State of New York and sustaining a writ of habeas corpus and discharging the respondent prisoner (Record —Remittitur of Court of Appeals of New York). The order and judgment of the Court of Appeals were made the judgment of the Supreme Court

by the filing of the remittitur of said court with the County Clerk of Kings County on the 6th day of March, 1936, and the entry of the judgment and order of the Supreme Court on the same date. Copies of the orders and judgments are included with the Records and are annexed hereto (pp. 83–87).

The opinions of the Court of Appeals, majority and minority, were handed down on March 3, 1936. They appear in the Appendix hereto, pages 52–82. The remittitur was issued to the Supreme Court March 4, 1936. By the judgment and remittitur the Court of Appeals reversed the determination of the Supreme Court at Special Term and directed the discharge of the prisoner, respondent, basing its decision upon the determination, expressed in the Chief Judge's opinion, that the New York State Minimum Wage Law for Women and Minors (Chap. 584, Laws of 1933) is in violation of the Constitution of the United States, on the sole authority of the decision of this court in the case of *Adkins* v. *Children's Hospital*, 261 U. S. 525. The statute held to be invalid is printed in the Appendix hereto, page 27.

The determination was necessarily based on the provisions of the Fourteenth Amendment to the Constitution of the United States. Respondent does not oppose the issuance of the writ herein prayed for (p. 9 herein).

Questions Presented

1. In the light of the factual background of Chapter 584, Laws of 1933, declared in section 550 thereof by the legislature, and unchallenged by respondent Tipaldo, does said statute violate the provisions of the Fourteenth Amendment of the United States Constitution?

2. Do the provisions of Chapter 584, Laws of New York, 1933, operate to deprive the respondent Tipaldo of his liberty or property without due process of law in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States?

3. Is the decision of this court in *Adkins* v. *Children's Hospital*, 261 U. S. 525, declaring the 1918 Minimum Wage Law for Women in the District of Columbia (40 Stat. 964, c. 174) to be void, controlling in the consideration of Chapter 584, Laws of 1933, of New York State, in the case of *Tipaldo* v. *Morehead*, herein:

(a) In the light of the differences between the statutes themselves;

(b) In the light of economic conditions affecting women employed in New York State, shown to exist and unchallenged;

(c) In the light of the public policy stated by the legislature in section 552 on the basis of the findings stated in section 550 of the act?

Statement of Facts of the Case

Respondent herein, Joseph Tipaldo, was indicted for the crime of forgery, third degree, by the Kings County Grand Jury, November 2, 1934.

Respondent in concert with others conspired to and did forge and alter books of account and records in order to conceal disobedience to the provisions of the Minimum Wage Law for Women and Minors (Chap. 584, Laws of 1933; Art. 19, Labor Law of New York State). Among the charges was the conspiring to and making of "false entries" in the time book of said laundry for the purpose of making it appear that the

said adult women employees did in fact receive the amount of wages "ordered by the Industrial Commissioner" (fols. 19, 20).

The indictments all were based on the violation of the Minimum Wage statute which provides for the establishment of a minimum rate of wage for women and minors in certain industries, determined after inquiry and study of conditions therein, and provides for its enforcement and administration (fol. 19). The wrongs charged find their roots in the statute and upon arrest respondent Tipaldo sued out a writ of habeas corpus, attacking the statute as void and unconstitutional, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States. He thereby sought to test the legality of his arrest and imprisonment.

On the hearing upon the writ of habeas corpus on April 30, 1935, before the Supreme Court of New York at Special Term, and in his petition for said writ, the relator (respondent Tipaldo) placed his reliance wholly upon the cases of *Adkins* v. *Children's Hospital*, 261 U. S. 525, and *Topeka Laundry Co.* v. *Court of Industrial Relations*, 119 Kan. 12 (fol. 23). The writ was dismissed (fols. 39–42) and the opinion of the Special Term Justice appears in the appendix hereto (p. 43). With the certification that a constitutional question was involved, appeal was taken directly to the highest court of the State, the Court of Appeals, under the provisions of the Civil Practice Act (§ 588) without security (fols. 43–46).

In the lower court and in the Court of Appeals, respondent Tipaldo placed his attack on the validity of the statute on the controlling force of the *Adkins* decision of this court, contending that

the provisions of Chapter 584, Laws of 1933, were violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States. Petitioner herein, respondent in the Court of Appeals, contended that the provisions of the New York statute differ materially from the act under consideration in the *Adkins* case; that the facts conditioning and underlying the New York statute created a situation on the basis of which the New York Minimum Wage Law was valid, and wholly different from those which may have prevailed in the District of Columbia when the District Minimum Wage Law was there enacted in 1918; that the decision in the *Adkins* case was not controlling in the instant proceeding; and that whether the *Adkins* case and the principles therein enunciated be followed or not, Chapter 584, Laws of 1933, of New York State is a valid exercise of the sovereign power of the New York State legislature and does not violate the Fourteenth Amendment of the United States Constitution.

The determination in the Court of Appeals was reached by a divided court, four judges concurring in the majority opinion by the Chief Judge, three dissenting in an opinion by Judge Lehman. The opinions are annexed hereto in the appendix (pp. 52–83). The majority opinion is based upon the grounds that *Adkins* v. *Children's Hospital* (261 U. S. 525) is controlling; that the statutes are not materially different, and that the law is invalid as violating the Constitution of the United States on the authority of the *Adkins* case. The remittitur certifies that the Federal constitutional question necessarily underlies the decision of the Court of Appeals and the opinions bear this out. (Record. Appendix, p. 84.)

Reasons for Allowing This Writ

1. The cause draws into question the due process clause of the Fourteenth Amendment of the Constitution of the United States as the necessary basis of the decision in the case.

2. The Court of Appeals of New York State has based its decision solely on the alleged controlling force of the decision of this court in *Adkins* v. *Children's Hospital*, 261 U. S. 525, which case is clearly distinguishable, on the underlying facts as well as in the statutes under consideration, from the instant case and is not controlling herein.

3. The case of *Adkins* v. *Children's Hospital*, 261 U. S. 525, is not and should not be held to be controlling in the case at bar, where a statute of a State legislature enacted under vitally different underlying conditions, unchallenged, is aimed to eliminate oppressive conditions and promote the welfare of the State.

4. The provisions of Chapter 384, Laws of 1933, of New York, constituting the Minimum Wage Law for Women and Minors in New York State (Labor Law, Art. 19) differ materially in substance and in application from the District of Columbia Act of 1918 (Chap. 174; 40 Stat. 964); the New York statute does not contravene the provisions of the Fourteenth Amendment of the Constitution of the United States or of any other of its articles.

5. The construction and application of the Constitution of the United States and a prior decision of this, the Supreme Court of the United States, are necessarily involved in the case.

6. The circumstances prevailing under which the New York law was enacted call for a reconsideration of the *Adkins* case in the light of the New York act and conditions aimed to be remedied thereby.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of New York and to the Court of Appeals of the State of New York, commanding the said courts to certify the above cause to this court for review and determination as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this court may be deemed appropriate. A certified copy of the record in the courts below is submitted herewith in support of this petition.

Respectfully submitted,
FREDERICK L. MOREHEAD,
Petitioner,
By
JOHN J. BENNETT, JR.,
Attorney General of the
State of New York,
Attorney for Petitioner,
HENRY EPSTEIN,
Solicitor General, State of New York,
Counsel for Petitioner.

Respondent Tipaldo herein does not oppose the granting of the petition herein for a writ of certiorari.

March ...., 1936.

GATES & LEVITT,
Attorneys for .....

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FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

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PEOPLE EX REL. JOSEPH TIPALDO,

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BRIEF IN SUPPORT OF PETITION

(A) Opinions of the courts below.

The opinion rendered in the Supreme Court, Kings County, on the writ of habeas corpus, appears at p. 16 of the record, and is also annexed hereto (p. 43).

The Special Term opinion held the statute valid as proper exercise of the sovereign power of the State in aid of the general welfare of its people. That part of the opinion dealing with an "emergency" was not raised by either party and was conceded not to be an issue. The legislation was not based on any "emergency," but was intended for permanent operation in the fixing of minimum fair wages for women and minors where necessary to prevent "oppressive" wages as defined in the act.

The opinion of the Court of Appeals, as well as the dissenting views are also annexed hereto (pp. 52–83).

The opinion of that court, rendered by the Chief Judge, relies upon the determination of this court in *Adkins* v. *Children's Hospital*, 261 U. S. 525, as controlling its judgment of the case at bar. No material differences are said to be observed by the court in the statutes and the changes in economic factors are not considered by the court in a strict adherence to the decision in the *Adkins* case. The court voids the statute as against the Fourteenth Amendment and asserts the underlying question of the United States Constitution as its ground.

The minority opinion (the decision having been reached by a four to three vote of the judges) distinguishes between the statutes in the *Adkins* and the instant cases; points out the adherence in the New York act to the principles laid down in the *Adkins* case; bases its argument for sustaining the New York Minimum Wage Law on the vital economic factors, unchallenged in record or on briefs, which persuaded the legislature to enact the law; and sustains the law as a valid exercise of the police power of the State for the public good.

(B) Jurisdiction.

The appellate jurisdiction of the Supreme Court of the United States is invoked under Section 237-(b) of the Judicial Code of the United States (28 U. S. C. A. § 344) to correct error of the Court of Appeals of the State of New York in the within cause. In the enforcement of a State statute (Chap. 584, Laws of 1933) respondent was charged with an offense, indicted and arrested. A writ of habeas corpus was sued out, to test the validity of the statute in ques-

tion. In the Supreme Court of the State of New York the writ was dismissed and the statute held valid.

On appeal to the Court of Appeals, the court of last resort, the decision and judgment below were reversed, the writ sustained and the prisoner, respondent herein, discharged. The determination of the Court of Appeals is based upon the application of the provisions of the Fourteenth Amendment of the Constitution of the United States to the statute and relies solely on the decision of this court in *Adkins* v. *Children's Hospital*, 261 U. S. 525.

There is thereby necessarily "drawn in question the validity of a statute" of the State of New York, "on the ground of its being repugnant to the Constitution * * * of * * * the United States." The Federal question is necessarily presented.

Petitioner contends that the provisions of Chapter 584, Laws of New York, 1933, are not repugnant to the Constitution of the United States.

(C) Facts.

The facts are set forth at pages 5–7 hereof. They are not disputed.

(D) Assignments of Error.

1. The Court of Appeals erred in holding that the New York State Minimum Wage Law (Chap. 584, Laws 1933) did not differ materially from the Act of Congress ruled upon in *Adkins* v. *Children's Hospital* (261 U. S. 525) and constitutes "an unconstitutional interference with the liberty of contract."

2. The Court of Appeals erred in holding that the principles and ruling of the *Adkins* case are applicable to and controlling in the instant statute and case, in that it held

(a) The distinction between this case and the *Adkins* case is merely a difference in details, methods and time, and not a substantial difference in theory and practice, and

(b) What was vague in the statute under consideration "has not been made any clearer" in the instant case.

3. The Court of Appeals erred in holding that the changes in economic conditions of women in industry in New York State shown to have taken place in the last decade or more and declared by the legislature as the basis for enacting the New York Minimum Wage Law for women and minors, and unchallenged herein, were not sufficient to validate the statute under the Constitution of the United States, despite the acceptance of the principles of the *Adkins* case.

4. The Court of Appeals erred in rejecting the thesis that the exceptional circumstances and conditions shown to exist in respect of women in industrial employment in New York State justified such restraint upon the freedom of contract as is embodied in the New York State law herein considered.

5. The Court of Appeals erred in holding that this law (Chap. 584, Laws of 1933) in prohibiting the payment of an "oppressive wage", both lower than the fair value of the services rendered and also less than sufficient to maintain health sub-

sistence, constitutes an unreasonable restraint upon freedom of contract under the Constitution of the United States.

6. The Court of Appeals erred in holding that Chapter 584, Laws of 1933 of New York State, violates the provisions of the Fourteenth Amendment of the Constitution of the United States in that it held

(a) The operation of the said statute deprived the respondent Tipaldo of his liberty withouf due process of law, and

(b) The enactment of the said statute was not a reasonable exercise of the sovereign power of the legislature of the State of New York in the interest of the health and welfare of its citizens.

(E) Summary of Argument.

(1) The case of *Adkins* v. *Children's Hospital*, 261 U. S. 525, and the statute therein held invalid, are clearly distinguishable from and not controlling in consideration of the instant case and the New York Minimum Wage Law herein.

(a) The decision of this court in the *Adkins* case is not controlling and not applicable to the facts or law in the instant case.

(b) The underlying facts are different and the statutes different in substance.

(2) The determination of the legislature of New York State as to the necessity of public welfare and the appropriateness of the remedial measures adopted is presumptively valid. The burden of showing the palpable invalidity of the remedy adopted has not been met by respondent herein.

(a) Legislative findings;

(b) Facts establish the reasonable ground for said findings;

(c) None such facts are challenged;

(d) Sole reliance is placed upon the decision of this court in the *Adkins* case.

(3) The New York Minimum Wage Law for Women and Minors is a valid exercise of the sovereign power of the legislature of the State.

(a) The law is legitimate in the public purpose sought to be attained and reasonable in the method used to achieve the purpose.

(b) The health of women in industry, where exploitation has resulted from lack of equality in bargaining power and other factors, is a matter of legislative concern.

(c) Fixing of wages in industry is permitted by the courts in proper cases.

I.

The case of Adkins v. Children's Hospital, 261 U. S. 525, and the act of Congress (40 Stat. 964, Chap. 174) there before this court differ materially and are clearly distinguishable from the instant case and the New York State Minimum Wage Law (Chap. 584, Laws 1933).

(a) The Statutes.

1. The District of Columbia Act, attacked in the *Adkins* case, was aimed to provide women and minors in industry with wages adequate to maintain decent standards of living (§ 23). Its sole standard was the vague and variable "cost of living". The New York Act provides as the basis for the wage the "fair value" of the services rendered in each separate industry where applied. (§ 551-8)

2. In the *Adkins* case the statute might require an employer to pay *more* than the value of the services. The New York act can only require the payment of the value of the services at the very most.

3. In the *Adkins* case the statute applied a formula having no relationship to the actual value of the services. The New York act defines the minimum wage as one "fairly and reasonably commensurate with the value of the service or class of service rendered". (§ 551-8)

4. The District of Columbia statute applied to all occupations with an identical standard for all. The New York act applies only to individual industries in which inquiry discloses the evil of an "oppressive wage" to be present. (§ 551-7; § 552).

5. The New York act provides a nine months' probationary period before the wage set by the Wage Board may be mandatory. Public hearings, opportunity for modification to meet changing costs and conditions are provided (§§ 555–562). The full review provided in the Labor Law, Article 3, is permitted. That provision of the Labor Law was sustained in this court.

Matter of *Helfrick* v. *Dahlstrom Metallic Door Co.*, 256 N. Y. 199; *284* U. S. *594*

(b) The Underlying Facts.

1. Social, economic, and industrial conditions in New York State vary greatly from those prevailing in the urban area of the District of Columbia. In the District of Columbia there were affected *in total* some 17,000 female and minor workers in the very restricted businesses, largely retail concerns, clerical and hotel services; in contrast with which there are engaged in industry in New York State some 1,500,000 women alone, approximately 15 per cent of the State's entire population.[1]

In the laundry industry itself, in which this case arose, there are some 22,000 women employed. These are concentrated in urban centers and represent wage levels ranging from substantial numbers under five dollars per week, to more than ninety per cent receiving under fifteen dollars per week. In all the industries employing women in New York State, in the period from 1913–1934, a very

[1] Taken from U. S. Census—See Appendix, Tables I and II, factual material.

substantial number earned less than ten dollars per week and a considerable number under five dollars per week. The week was normally one of at least forty hours.[2]

2. In the State of New York from 1900 to 1930 the number of females over ten years of age engaged in industry increased from 672,045 to 1,415,105.[3]

3. In the State of New York from 1890 to 1930 the number of married women over fifteen years of age employed in industry increased from 42,968 to 328,460, or from almost 4 per cent to about 12 per cent of all married women in those age limits.[4] Seventy-two per cent of these live with families of two or more members.[5]

4. Women's earnings compared with men's for identical tasks, and compared with other women's for identical tasks, in identical industries, show such wide variations as to indicate no true relationship to the fair value of services rendered.

(Charts and Tables, pp. 21–30 Factual Material.)

5. Efforts of groups of employees to remedy "oppressive wage" conditions have proved fruitless without governmental aid. The major industrial plants in the laundry industry supported the position of the State in the Court of Appeals.*

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[2] N. Y. Dept. of Labor Reports—See Appendix, Tables X, XI, factual material.

[3] U. S. Census 1930—See Chart I, factual material—p. 2.

[4] U. S. Census 1930—See Chart II, p. 6, Appendix, Table V, factual material.

[5] U. S. Dept. of Commerce—Census Monograph, pp. 122–156.

* Dissenting opinion and Brief Amicus Curiae of *Interborough Coat and Apron Ass'n* and *Towel and Napkin Launderers, Assoc.* in Court of Appeals.

6. Other vital considerations vary. (See factual material.)

Facts and circumstances condition legislation and govern the determination of constitutional validity.

O'Gorman & Young v. *Hartford Ins. Co.*, 282 U. S. 251
Bunting v. *Oregon*, 243 U. S. 426
Radice v. *New York*, 264 U. S. 292
Nebbia v. *New York*, 291 U. S. 502
Borden's Co. v. *Ten Eyck*, decided Jan. 1936 (U. S. Supreme Court).

(c) The opinion of the Court in Adkins v. Children's Hospital, 261 U. S. 525.

(1) "*The moral requirement implicit in every contract of employment, viz: that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored.*"

The New York statute prescribes as the very basis of the wage the fair value of the services rendered, supplying the answer to this very pertinent objection.

(2) "*A statute requiring an employer * * * to pay the value of the services rendered * * * would be understandable.*"

The New York statute prescribes the very standard here indicated by the court.

The use of the "minimum cost of living necessary for health" (§§ 551–7) in the act is only in defining an "oppressive and unreasonable wage" and not in defining the "fair wage," which is "a wage fairly and reasonably commensurate with

the value of the service or class of service rendered" (§§ 551–8). It is the "oppressive" wage which is prohibited and the "fair wage" which is set as a minimum. Thus the cost of living element does *not* enter into the "fair wage" determination, based solely on value of services. The "cost of living" for health maintenance is *at most* a check "downward," a barometric reading in the calculus of the wage system to ascertain where there *may* exist an "oppressive" wage. There was no such basis, nor any such definition in the statute at bar in the *Adkins* case.

(3) The statutes and decisions discussed in the *Adkins* case placing restraints on frauds and unfair methods in wage payments, etc., are applicable here. No constitutional rights exist to cheat and exploit another by reason of a more potent economic position.

Holden v. *Hardy,* 169 U. S. 366
McLean v. *Arkansas,* 211 U. S. 539
Radice v. *New York,* 264 U. S. 292
Chicago, etc. R. R. v. *Wellman,* 143 U. S. 339–346
Highland v. *Russell Car Co.,* 279 U. S. 253–262.

(4) *"No real test of the economic value of the law can be had during periods of maximum employment, * * *; that will come in periods of depression * * *."*

That period, the time for evaluation of the minimum wage law, as indicated by this court, has now come. Wage levels were raised

to a fair return for the services and without reducing others to the minimum (Factual Background—VI—pp. 63–79). The cases cited as being "somewhat similar" to this statute by the opinion of the Court of Appeals herein, and which followed the *Adkins* case, were all based on the identical standard of the *Adkins* case and not like the statute of New York here before this court. The *Adkins* case is, therefore, not controlling in the instant case and this court should review the decision of the Court of Appeals to establish that fact. *Each case of a State statute tested under the Fourteenth Amendment presents an individual instance in which the variance in facts must be considered as bearing upon the applicability of other decided cases.*

Muller v. *Oregon*, 208 U. S. 412–420, 421
Nebbia v. *New York*, 291 U. S. 502
Jacobson v. *Massachusetts*, 197 U. S. 11.

(d) Thus not only are the cases and statutes distinguished, but even accepting the principles of the *Adkins* case, the present statute and the conditions shown to prevail in New York State meet every requirement of and avoid the objectionable features pointed out as the basis for the decision in the *Adkins* case.

II.

The determination by statute of the Legislature of New York State as to the necessity for and appropriateness of the measures adopted to provide for the public welfare is presumptively valid; the burden of establishing the invalidity of the remedy under the Fourteenth Amendment has not been met by respondent herein.

(a) The legislative Findings set forth in § 550 of the New York Minimum Wage Law, and amply substantiated by the evidence from recognized and official sources (Factual Brief) pertinent to New York State alone, establish the reasonableness of the remedy beyond doubt. These findings and the facts supporting them are unquestioned and unchallenged by respondent herein.

> 1. "We have not taken issue with the factual recitals in the act."
>
> (Appellant Tipaldo's Reply Brief in Court Appeals.)
>
> 2. "The appellant does not challenge these findings of fact by the legislature, nor does he challenge the statements in the 'Factual Brief' submitted by the respondent to sustain and amplify these findings."
>
> (See opinion of Lehman, J.)

(b) Reliance below upon argument and in briefs was placed wholly on *Adkins* v. *Children's Hospital*, 261 U. S. 525.

The varying conditions and changed circumstances, as well as the statutory differences, were not considered as valid considerations, despite repeated decisions of this court to the contrary.

(c) In the face of established vitally different conditions, changed circumstances,—a different statute, or even a like statute, is entitled to reconsideration in the applicability of the Fourteenth Amendment.

Bloch v. *Hirsch*, 256 U. S. 135
Hurtado v. *California*, 110 U. S. 516
Holden v. *Hardy*, 169 U. S. 366
Chastleton Corp. v. *Sinclair*, 264 U. S. 543
Abie State Bank v. *Bryan*, 282 U. S. 765.

(d) The burden of meeting these facts and showing the act to be palpably in excess of legislative power was not met in the instant case.

Missouri Pac. R. R. v. *Norwood*, 283 U. S. 249
Borden's Farm Products v. *Baldwin*, 293 U. S. 194.

Failing this, the validity of the statute under the Fourteenth Amendment should have been sustained. No patent invalidity on the face of the statute is apparent.

III.

The New York Minimum Wage Law for women and minors is a valid exercise of the sovereign police power of the Legislature of New York State.

(a) The purpose is legitimate. It is for the promotion of the public welfare and protection of women from oppressive wages and exploitation (§ 550).

Adkins v. *Children's Hospital* (*supra*).

(b) The method is reasonable and the standard definite and related to the relationship of employer and employee.

The fair minimum wage must be on a *quantum meruit*, or value of service basis (§ 551, sbd. 8). The inquiry is directed by a wage board representing all interested parties; is based on evidence from wide sources *in the industry affected;* is subjected to public hearings; to a probationary period of nine months before the order becomes mandatory; is subject to modification on showing of changed conditions within the industry affected; is related to the specific industries in which the evils sought to be remedied appear (§§ 553-563). Review of a full and reasonable nature is provided for by the Industrial Board and the courts under Article 3 of the Labor Law (§ 563). The discretion of the Wage Board is clearly prescribed and its limits sharply defined (§ 555, subds. 1-6; §§ 556, 557).

(c) Such limited and reasonable infringement upon the freedom of contract in the interest of the general welfare, for a proper public purpose, does not contravene the Fourteenth Amendment.

Nebbia v. *People*, 291 U. S. 502.
McLean v. *Arkansas*, 211 U. S. 539.
McCulloch v. *Maryland*, 4 Wheat. 316–431.

The quantum of reasonableness is the determining factor.

Mugler v. *Kansas*, 123 U. S. 623.
Atkin v. *Kansas*, 191 U. S. 207–223.
O'Gorman & Young v. *Hartford*, 282 U. S. 251, 257, 258.

(d) The assurance of fair wages between employees and employer; the fixing of prices under certain fitting circumstances; the elimination of sources of unfair competition and unfair advantages, have all been recognized by this court as proper legislative restrictions upon liberty of contract.

Texas etc. R. R. v. *Railway Clerks,* 281 U. S. 548.
Central Lumber Co. v. *South Dakota,* 226 U. S. 157.
Radice v. *New York,* 264 U. S. 292.
Riley v. *Massachusetts,* 232 U. S. 671.
German Alliance Ins. Co. v. *Lewis,* 233 U. S. 389–417.
Holden v. *Hardy,* 169 U. S. 366.
N. Y. Central & H. R. R. v. *Williams,* 199 N. Y. 108.
Griffith v. *Connecticut,* 218 U. S. 563.
Stettler v. *O'Hara,* 243 U. S. 629.

To paraphrase the language of Mr. Justice Butler in *Highland* v. *Russell Car etc. Co.,* 279 U. S. 253–262, the New York Minimum Wage Law merely deprives the employer of the right or opportunity by negotiation to pay less than the fair value of the services rendered.

CONCLUSION

The time for the evaluation of a State Minimum Wage Law has definitely arrived. The New York State Minimum Wage Law (Chap. 584, Laws 1933) contains none of the provisions condemned by the Supreme Court in the *Adkins* case. It further contains the very provisions

safeguarding the interest of the employees suggested by the prevailing opinion in that case. It constitutes a valid exercise of the sovereign power of the New York legislature in the interest of public welfare. It contravenes no provision of the Constitution of the United States.

The writ of certiorari herein prayed for should be granted.

Respectfully submitted,

JOHN J. BENNETT, JR.,

Attorney General of the State of New York,
Attorney for Petitioner,

HENRY EPSTEIN,

Solicitor General, State of New York,
Counsel.

APPENDIX A

LAWS OF NEW YORK—By Authority

CHAPTER 584

AN ACT to amend the labor law, in relation to the determination and establishment of minimum fair wage standards for women and minors, with provision for the imposition of penalties for the violation thereof.

Became a law April 29, 1933, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter fifty of the laws of nineteen hundred twenty-one, entitled "An act in relation to labor, constituting chapter thirty-one of the consolidated laws," is hereby amended by inserting therein a new article, to be article nineteen, to read as follows:

ARTICLE 19

Minimum Fair Wage Standards for Women and Minors

Section 550. Factual background.
551. Definitions.
552. Contracts of employment void as against public policy.
553. Investigatory powers.
554. Power and duty of commissioner to appoint wage board.
555. Constitution of wage board.
556. Report of wage board.
557. Action of the commissioner on report of wage board.
558. Special licenses.
559. Publicity.
560. Commissioner's power to make orders mandatory.
561. Reconsideration of wage orders.

562. Reconsideration of administrative regulations.
563. Right of review.
564. Records and notices required of employers.
565. Penalties.
566. Recovery of wages.
567. Construction.

Section 550.* The employment of women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern. Many women and minors employed for gain in the state of New York are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Since a very large percentage of such workers are obliged from their week to week wages to support themselves and others who are dependent upon them in whole or in part they are, by reason of their necessitous circumstances, forced to accept whatever wages are offered them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service rendered. Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage

* So in original. [Section heading omitted.]

standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the legislature this article is constitutional.

§ 551. Definitions. As used in this article:

1. "Commissioner" shall mean the industrial commissioner.

2. "Director" shall mean the director or any deputy director of the minimum wage division, which shall be set up as a separate division in the department of labor by the commissioner with a director in charge and with such deputy directors and other assistants and employees as the commissioner may deem desirable.

3. "Wage board" shall mean a board created as provided in section five hundred and fifty-five of the article.

4. "Woman" shall mean a female of twenty-one years or over.

5. "Minor" shall mean a person of either sex under the age of twenty-one years.

6. "Occupation" shall mean an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm.

7. "An oppressive and unreasonable wage" shall mean a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health.

8. "A fair wage" shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

9. "A directory order" shall mean an order the non-observance of which may be published as provided in section five hundred and fifty-nine of this article.

10. "A mandatory order" shall mean an order the violation of which shall be subject to the penalties prescribed in paragraph two of section five hundred and sixty-five of this article.

§ 552.* It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void.

§ 553.* The commissioner or the director or any authorized representative of the director shall have full power and authority:

1. To investigate and ascertain the wages of women and minors employed in any occupation in the state;

2. To enter the place of business or employment of any employer of women and minors in any occupation for the purpose of examining and inspecting any and all books, registers, payrolls, and other records of any employer of women or minors that in any way appertain to or have a bearing upon the question of wages of any such women or minors and for the purpose of ascertaining whether the orders of the commissioner have been and are being complied with; and

3. To require from such employer full and correct statements in writing when the commissioner or the director or any authorized representative of the director deems necessary, of the wages paid to all women and minors in his employment.

* So in original. [Section heading omitted.]

§ 554.* The commissioner or the director shall have the power, and it shall be the duty of the commissioner on the petition of fifty or more residents of the state, to cause an investigation to be made by the director or any authorized representative of the director, of the wages being paid to women or minors in any occupation to ascertain whether any substantial number of women or minors in such occupation are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one. If, on the basis of information in the possession of the commissioner or the director, with or without a special investigation, the commissioner is of the opinion that any substantial number of women or minors in any occupation or occupations are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one, he shall appoint a wage board to report upon the establishment of minimum fair wage rates for such women or minors in such occupation or occupations.

§ 555.* 1. A wage board shall be composed of not more than three representatives of the employers in any occupation or occupations, an equal number of representatives of the employees in such occupation or occupations and of not more than three disinterested persons representing the public, one of whom shall be designated as chairman. The commissioner after conferring with the director shall appoint the members of such wage board, the representatives of the employers and employees to be selected so far as practicable from nominations submitted by employers and employees in such occupation or occupations. Two-thirds

* So in original. [Section heading omitted.]

of the members of such wage board shall constitute a quorum and the recommendations or report of such wage board shall require a vote of not less than a majority of all its members. Members of a wage board shall serve without pay, but may be reimbursed for all necessary traveling expenses. The commissioner after conferring with the director shall make and establish from time to time rules and regulations governing the selection of a wage board and its mode of procedure not inconsistent with this article.

2. A wage board shall have power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the production of all books, records, and other evidence relative to any matters under investigation. Such subpoenas shall be signed and issued by a member of the wage board and shall be served and have the same effect as if issued out of the supreme court. A wage board shall have power to cause depositions of witnesses residing within or without the state to be taken in the manner prescribed for like depositions in civil actions in the supreme court.

3. The commissioner or the director shall present to a wage board promptly upon its organization all the evidence and information in the possession of the commissioner or director relating to the wages of women and minor workers in the occupation or occupations for which the wage board was appointed and all other information which the commissioner or the director deems relevant to the establishment of a minimum fair wage for such women and minors, and shall cause to be brought before the committee any witnesses whom the commissioner or the director deems material.

A wage board may summon other witnesses or call upon the commissioner or the director to furnish additional information to aid it in its deliberation.

4. Within sixty days of its organization a wage board shall submit a report including its recommendations as to minimum fair wage standards for the women or minors in the occupation or occupations the wage standards of which the wage board was appointed to investigate. If its report is not submitted within such time the commissioner may constitute a new wage board.

5. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality.

6. A wage board may recommend a suitable scale of rates for learners and apprentices in any occupation or occupations, which scale of learners' and apprentices' rates may be less than the regular minimum fair wage rates recommended for experienced women or minor workers in such occupation or occupations.

§ 556.* A report from a wage board shall be submitted to the commissioner who shall within ten days confer with the director and accept or reject such report. If the report is rejected the commissioner shall resubmit the matter to the same wage board or to a new wage board with a

* So in original. [Section heading omitted.]

statement of the reasons for the resubmission. If the report is accepted it shall be published together with such proposed administrative regulations as the commissioner after conferring with the director may deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards to be established, and notice shall be given of a public hearing to be held by the commissioner or the director not sooner than fifteen nor more than thirty days after such publication at which all persons in favor of or opposed to the recommendations contained in such report or in such proposed regulations may be heard.

§ 557.* Within ten days after such hearing the commissioner shall confer with the director and approve or disapprove the report of the wage board. If the report is disapproved the commissioner may resubmit the matter to the same wage board or to a new wage board. If the report is approved the commissioner shall make a directory order which shall define minimum fair wage rates in the occupation or occupations as recommended in the report of the wage board and which shall include such proposed administrative regulations as the commissioner may deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards established. Such administrative regulations may include among other things, regulations defining and governing learners and apprentices, their rates, number, proportion or length of service, piece rates or their relation to time rates, overtime or part-time rates, bonuses or special pay for

* So in original. [Section heading omitted.]

special or extra work, deductions for board, lodging, apparel or other items or services supplied by the employer, and other special conditions or circumstances; and in view of the diversities and complexities of different occupations and the dangers of evasion and nullification, the commissioner may provide in such regulations without departing from the basic minimum rates recommended by the wage board such modifications or reductions of or addition to such rates in or for such special cases or classes of cases as those herein enumerated as the commissioner may find appropriate to safeguard the basic minimum rates established.

§ 558. For any occupation for which minimum fair wage rates have been established the commissioner or the director may cause to be issued to a woman or minor, including a learner or apprentice, whose earning capacity is impaired by age or physical or mental deficiency or injury, a special license authorizing employment at such wages less than such minimum fair wage rates and for such period of time as shall be fixed by the commissioner or the director and stated in the license.

§ 559.* If the commissioner or the director or any authorized representative of the director has reason to believe that any employer is not observing the provisions of any order made by him under section five hundred and fifty-seven of this article, the commissioner or the director may, on fifteen days' notice summon such employer to appear before the commissioner or the director to show cause why the name of such employer should not be published as having failed to observe the provisions of such order. After such hearing and the

* So in original. [Section heading omitted.]

finding by the commissioner or the director of non-observance, the commissioner may cause to be published in a newspaper or newspapers circulating within the state of New York or in such other manner as the commissioner may deem appropriate, the name of any such employer or employers as having failed in the respects stated to observe the provisions of the directory order of the commissioner. Neither the commissioner nor any authorized representative of the commissioner, nor any newspaper publisher, proprietor, editor, nor employee thereof shall be liable to an action for damages for publishing the name of any employer as provided for in ~~this~~ article, unless guilty of some wilful misrepresentation.

§ 560.* If at any time after a directory minimum fair wage order has been in effect for nine months the commissioner is of the opinion after conferring with the director that the persistent non-observance of such order by one or more employers is a threat to the maintenance of fair minimum wage standards in any occupation or occupations the commissioner or the director may give notice of the intention of the commissioner to make such order mandatory and of a public hearing to be held not sooner than fifteen nor more than thirty days after such publication at which all persons in favor of or opposed to a mandatory order may be heard by the commissioner or the director. After such hearing the commissioner, if he adheres to his opinion, may make the previous directory order or any part thereof mandatory and so publish it.

§ 561.* At any time after a minimum fair wage order has been in effect for one year or more,

* So in original. [Section heading omitted.]

whether during such period it has been directory or mandatory, the commissioner may on his own motion after conferring with the director and shall on petition of fifty or more residents of the state reconsider the minimum fair wage rates set therein and reconvene the same wage board or appoint a new wage board to recommend whether or not the rate or rates contained in such order should be modified. The report of such wage board shall be dealt with in the manner prescribed in sections five hundred and fifty-six and five hundred and fifty-seven of this article provided that if the order under reconsideration has theretofore been made mandatory in whole or in part by the commissioner under section five hundred and sixty then the commissioner in making any new order or confirming any old order shall have power to declare to what extent such order shall be directory and to what extent mandatory.

§ 562.* The commissioner may at any time and from time to time after conference with the director propose such modifications of or additions to any administrative regulations included in any directory or mandatory order of the commissioner without reference to a wage board, as the commissioner may deem appropriate to effectuate the purposes of this article, provided such proposed modifications or additions could legally have been included in the original order, and notice shall be given of a public hearing to be held by the commissioner or director not less than fifteen days after such publication at which all persons in favor of or opposed to such proposed modification or additions may be heard. After such hear-

* So in original. [Section heading omitted.]

ing the commissioner may make an order putting into effect such proposed modification of or additions to the administrative regulations as he deems appropriate, and if the order of which the administrative regulations form a part has theretofore been made mandatory in whole or in part by the commissioner under section five hundred and sixty, then the commissioner in making any new order shall have the power to declare to what extent such order shall be directory and to what extent mandatory.

§ 563.* All questions of fact arising under this act except as otherwise herein provided shall be decided by the commissioner or the director and there shall be no appeal from the decision of the commissioner or the director on any such question of fact, but there shall be a right of review by the industrial board and the courts as provided in article three of the labor law from any ruling or holding on a question of law included or embodied in any decision or order of the commissioner or the director.

§ 564.* Every employer of women and minor workers shall keep a true and accurate record of the hours worked by each and the wages paid by him to each and shall furnish to the commissioner or the director or the authorized representative of the director upon demand a sworn statement of the same. Such records shall be open to inspection by the commissioner or the director or any authorized representative of the director at any reasonable time. Every employer subject to a minimum fair wage order whether directory or

* So in original. [Section heading omitted.]

mandatory shall keep a copy of such order posted in a conspicuous place in every room in which women or minors are employed. Employers shall be furnished copies of orders on request without charge.

§ 565.* 1. Any employer and his agent, or the officer or agent of any corporation, who discharges or in any other manner discriminates against any employee because such employee has served or is about to serve on a wage board or has testified or is about to testify before any wage board or in any other investigation or proceeding under or related to this article or because such employer believes that said employee may serve on any wage board or may testify before any wage board or in any investigation or proceeding under this article shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars.

2. Any employer or the officer or agent of any corporation who pays or agrees to pay to any woman or minor employee less than the rates applicable to such woman or minor under a mandatory minimum fair wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, and each week in any day of which such employee is paid less than the rate applicable to him under a mandatory minimum fair wage order and each employee so paid less shall constitute a separate offense.

* So in original. [Section heading omitted.]

3. Any employer or the officer or agent of any corporation who fails to keep the records required under this article or to furnish such records to the commissioner or the director or any authorized representative of the director upon request shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than twenty-five nor more than one hundred dollars, and each day of such failure to keep the records requested under this article or to furnish same to the commissioner or the director or any authorized representative of the director shall constitute a separate offense.

§ 566.* If any woman or minor worker is paid by his employer less than the minimum fair wage to which he is entitled under or by virtue of a mandatory minimum fair wage order he may recover in a civil action the full amount of such minimum wage less any amount actually paid to him by the employer together with costs and such reasonable attorney's fees as may be allowed by the court, and any agreement between him and his employer to work for less than such mandatory minimum fair wage shall be no defense to such action. At the request of any woman or minor worker paid less than the minimum wage to which he was entitled under a mandatory order the commissioner may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court.

* So in original. [Section heading omitted.]

§ 567.* If any provisions of this article or the application thereof to any person or circumstance, is held invalid the remainder of the article and the application of such provision to other persons or circumstances shall not be affected thereby.

§ 2. This act shall take effect immediately.

STATE OF NEW YORK,
Department of State. } ss:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN
Secretary of State

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* So in original. [Section heading omitted.]

APPENDIX B

(1) Opinion of Supreme Court at Special Term—on Return of Writ of Habeas Corpus

By Mr. Justice May

People ex rel. Tipaldo v. *Morehead*—This is a proceeding by habeas corpus instituted by the relator to test the validity of a new article added to the Labor Law known as article 19, passed by the Legislature in 1933 and entitled "Minimum Fair Wage for Women and Children." The relator is imprisoned under an indictment which charges in substance that he, as manager of a laundry in Brooklyn, paid adult women employees a lesser sum than the minimum wage fixed for that class of employees by the Industrial Commissioner pursuant to the provisions of the act. He asserts that the statute contravenes the 14th Amendment of the Federal Constitution and article 1, section 6, of the Constitution of the State of New York, in that it operates to deprive him of liberty and property without due process of law, and also operates to compel him to be a witness against himself in a criminal case.

Section 550, the first section of the new article, recites the factual situation which, in the opinion of the Legislature, justified the enactment as a valid exercise of the police power. These recitals are in substance as follows: That the employment of women and minors in trade and industry in this state at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of "grave and vital concern"; that many women and minors so employed are not as a class upon a level of equality in bargaining with their employers in regard to "minimum fair wage standards," and

"freedom of contract" as applied to their relations with their employers is illusory; that since a very large percentage of such workers are obliged to support themselves and others from their weekly wages they are by reason of their "necessitous circumstances" forced to accept whatever wages are offered them; that judged by any reasonable standard wages in many cases are fixed by "chance and caprice" and bear no relation to the fair value of the services rendered. The remaining portion of the section reads as follows: "* * * Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition, where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the Legislature this article is constitutional."

The statute defines an "oppressive and unreasonable wage" and a "fair wage," and section 552 declares it to be against public policy to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined by the foregoing provisions. By other provisions there is set up a comprehensive scheme with adequate machinery to carry into effect the purpose of the act.

The underlying thought of relator's contention appears to be that the right of freedom of contract emanates from the Fifth Amendment to the United States Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law; and consequently that the minimum wage law here under consideration, in that it deprives an adult woman in full possession of her normal faculties of the right freely to contract with reference to her services, violates the similar inhibition upon states found in the due process clause of the Fourteenth Amendment.

In support of his contention relator relies principally upon the case of *Adkins* v. *Children's Hospital* (261 U. S. 525). In that case the court decreed the unconstitutionality of an act fixing the minimum wages for women and children in the District of Columbia. The court there asserted that it was no longer open to question that the right to contract with reference to one's affairs is a part of the liberty of the individual which is protected by the due process clause of the Fifth Amendment, that included in the right of personal liberty and private property is the right to contract for the acquisition of property, and

that chief among such contracts is that of personal employment whereby labor and other services are exchanged for money or other forms of property. After reference to decisions sustaining the validity of statutes relating to businesses "impressed with a public interest" and to decisions relating to statutes limiting the hours of labor in certain industries including the case of *Muller* v. *Oregon* (208 U. S. 412), the court wrote as follows: "* * * But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* case (p. 421) has continued 'with diminishing intensity.' In view of the great—not to say revolutionary changes which have taken place since that utterance in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.

Notwithstanding the force and cogency of this reasoning, this court is not prepared to assert that the *Adkins* case is an authority which impellingly necessitates an adjudication of the invalidity of the statute here involved. It is of special significance that in the *Adkins* case, with reference to the conception of liberty as involved in the words "right of contract" the court wrote: "An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, *unless it be supportable as a reasonable exercise of the police power of the State*". (Italics ours.) And again with reference to freedom of contract the court wrote: "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; *and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances* * * *" (Italics ours).

Here is a distinct and unequivocal pronouncement that a reasonable exercise of the police power may work an interference with liberty of contract that is not necessarily to be deemed arbitrary, and that an abridgement of that right may be justified by "exceptional circumstances."

The primary question here involved is whether, within the purview of the principles thus enunciated, the interference with the right to contract effected by the minimum wage law may be justified as an exercise of the police power, reasonable because justified by existing conditions, or to state it otherwise, whether the abridgement of

freedom of contract may be sanctioned "by the existence of exceptional circumstances" within the rule above stated.

An attempt to exhaustively review the substance of oral and written characterizations of the effect of the world-wide depression would serve no useful purpose. The court may take judicial notice that almost without warning it came upon mankind with an unforeseen and irresistible onrush that bound and fettered the world in its devastating grip. Business collapsed, our conceptions of economic and social securities were shattered, peace of mind was transformed into dread apprehension, contentment into unrest, comfort gave way to hardship and sufficiency to privation. As a result of this universal catastrophe, thousands of women reared to a life of ease, maintained in comfortable surroundings, inexperienced with the hardship of poverty, with no occupational training and with no business experience, suddenly found themselves engulfed in the whirlpool of industrial strife, forced there by a calamity of hitherto unknown magnitude, compelled to there engage in a merciless and to them unfamiliar competition.

Do the dictates of reason and the common experience of mankind impel the conclusion that under these conditions these women are on a parity with men in their ability to distinguish between legitimate and unscrupulous business practices, between the honest and dishonest employer, between fair dealing and chicanery, between "an oppressive and unreasonable wage" and a "fair wage" as defined in the act? The Legislature has answered the inquiry in the negative as evidenced

by the last sentence in section 550, which reads: "In the considered judgment of the Legislature this article is constitutional".

This declaration, unusual in a statute, indicates a legislative familiarity with the decisions of the higher courts with reference to legislation of this general character and amounts to a pronouncement that in the Legislature's opinion, the act in so far as it interferes with liberty of contract, is justified as a reasonable exercise of the police power by the existence of these "exceptional circumstances".

The act evidences a humane legislative intent to ameliorate human distress by affording a measure of security to women, who by reason of unprecedented adverse conditions existing at the time, were unable to adequately protect themselves in an industrial life, in which, as compared with men, they were at a disadvantage. Thus its ultimate purpose was to protect women from unscrupulous employers though the medium of a compulsory wage reasonably commensurate with the services rendered, and also to protect industry from evils which are frequently followed by unfair competition made possible by the exploitation of a designated class of employees. It would seem that public welfare is enhanced by legislation based upon humane consideration of this character, legislation justified as an exercise of the police power. The *Adkins* case was decided at the time of an era of comparative prosperity. This court is not prepared to assert that the same conclusion would have been reached had economic and industrial conditions then been as they were at the time of the enactment here involved.

The police power is inherently vested in the Legislature. It was never surrendered by the several states and consequently its free exercise is not necessarily impeded by the 14th amendment to the Federal Constitution. Through the exercise of this power "the state may regulate the relative rights and duties of all persons within its jurisdiction, so as to guard the public safety, protect the public morals, secure the public welfare and promote the common good and welfare". (*People* v. *Byrne*, 99 Misc., 1; *Jacobson* v. *Mass.*, 197 U. S. 11, p. 25; *People* v. *Adirondack Ry. Co.*, 160 N. Y., 225 p. 236).

In the case last cited, in speaking of the power of taxation, the police power and the power of eminent domain, the court said that these powers "* * * underlie the Constitution and rest upon necessity because there can be no effective government without them. They are not conferred by the Constitution but exist because the state exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the state as sovereign. While they may be limited and regulated by the Constitution, they exist independently of it as a necessary attribute of sovereignty. They belong to the state because it is sovereign, and they are a necessity of government. The state cannot surrender them, because it cannot surrender a sovereign power. It cannot be a state without them. They are as enduring and indestructible as the state itself".

Other well established legal principles are pertinent to the present inquiry.

Thus it is held that to warrant a court in declaring an act unconstitutional, the conflict between the statute and the constitution must

be "plain and unmistakable" and "that every presumption is in favor of the validity of a legislative enactment" (*People, &c.*, v. *Ryan*, 230 A. D., 252, p. 254; *City of Buffalo* v. *Hawks*, 226 A. D. 480, p. 485, aff'd. 251 N. Y., 588; *People &c.*, v. *Carter and Rice*, 135 N. Y., 473, p. 484; aff'd. 257 N. Y., 578; *Gardner* v. *Genther*, 232 A. D., 296, p. 298).

And if a reasonable doubt exists as to its validity the act should be upheld. Every reasonable doubt must be resolved in favor of its validity. (*City of Buffalo* v. *Hawks, supra; Gardner* v. *Genther, supra*).

Moreover, the acts of a Legislature are presumed to be "within its constitutional authority unless the contrary clearly appears" (*Schieffelin* v. *Goldsmith*, 253 N. Y. 243, p. 249; *Matter of McAneny* v. *Board*, 232 N. Y., 337 p. 389; *People ex rel. Cotte* v. *Gilbert*, 226 N. Y. 103, p. 106).

It is also the rule that one who asserts the invalidity of a statute or a classification must prove his contention (*People &c.* v. *Byrne, supra; Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194).

It has also been stated that: "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." (*O'Gorman* v. *Insurance Company*, 282 U. S., 251, p. 257–8; *People &c.*, v. *Katz*, 140 Miscellaneous 46, p. 47).

No proof of fact is here adduced in contradiction of the factual situation declared to exist by the Legislature. These facts so deemed to

exist form the basis for the conclusion that this legislation is not unconstitutional as exceeding the permissible bounds of the exercise of the police power, and it would not appear that it may be so decreed as matter of law.

Although the question is not here raised it may not be inappropriate to say that it does not appear that the minimum wage law evidences an unwarranted delegation of Legislative power to an administrative board or body. The act does not authorize the exercise of unlimited discretion in an undefined field. On the contrary a standard is prescribed. That standard is found in the definition of "a fair wage," which limits the authorized discretion of the administrative body within the confines indicated by the definition. In this respect the act is not defective for the reasons advanced in the recent decision of the United States Supreme Court in the Schecter case.

Without doubt, this legislation was prompted by humane and beneficient considerations. The intent was to protect a designated class from injustice and exploitation, thereby also promoting the public welfare by diminishing one cause of unfair competition with its resulting industrial chaos.

The writ is accordingly dismissed.

June 27, 1935.

COURT OF APPEALS

PEOPLE EX REL. JOSEPH TIPALDO,

Relator-Appellant.

against

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Respondent.

(2) Opinions of Court of Appeals

Crane, Ch. J.:—The appellant is the Manager of a laundry establishment operating in the borough of Brooklyn. Together with three other individuals he was indicted by the Grand Jury of Kings County for the violation of the Minimum Wage Law for Women (Laws of 1933, Ch. 584, in effect April 29, 1933). He was charged with the crime of paying to an adult woman employee a wage less than that promulgated by the Industrial Commissioner as the mandatory minimum wage applicable to such a woman engaged in that employment, in violation of section 565, subd. 2 of the Labor Law. By this habeas corpus proceeding the relator seeks to test the legality of his arrest and imprisonment, raising as the only question before the court the constitutionality of the statute, for the violation of which he has been held for trial. His contention is that the law contravenes the Fourteenth Amendment of the Constitution of the United States, and Article I, Section 6 of the Constitution of the State of New York, both of which provisions are the same in this particular.

Chapter 584 of the Laws of 1933, thus attacked, is entitled, "An Act to amend the labor law, in relation to the determination and establishment of minimum fair wage standards for women and minors, with provision for the imposition of penalties for the violation thereof." The applicability of the law as to minors is not questioned. The act provides the machinery for determining the minimum wage to be paid women in "an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm." The act defines "an oppressive and unreasonable wage" to be a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health. "A fair wage" shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing the fair minimum wage the Commissioner and the wage board may take into account (1) all relevant circumstances affecting the value of the service or class of service rendered; (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of service rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid; and (3) may consider the wages paid in the State for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

Section 552 reads as follows:

> "It is hereby declared to be against public policy for any employer to employ any

> woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void."

The rest of the act provides for the establishment of a wage board, for hearings, for the determination of the minimum wage, and for the directory order of the Commissioner regarding the payment thereof.

Section 565, subd. 2, for violation of which the relator has been indicted and imprisoned, reads as follows:

> "Any employer or the officer or agent of any corporation who pays or agrees to pay to any woman or minor employee less than the rates applicable to such woman or minor under a mandatory minimum fair wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, * * *."

We do not see wherein this act differs materially from the act of Congress ruled upon in *Adkins* v. *Children's Hospital* (261 U. S. 525), wherein it was held that the Minimum Wage Act of September 19, 1918, Ch. 174, 40 Stat. 960, was an unconstitutional interference with the liberty of contract. The interpretation of the Federal Constitution by the United States Supreme Court is binding upon us; we are in duty bound to follow its decisions unless they are inapplicable. We

find no material difference between the act of Congress and this act of the New York State Legislature. The act of Congress, it is said, was to protect women from conditions resulting from wages which were inadequate to maintain decent standards of living. The attorney-general's brief states it in these words: "The purpose of the statute in the *Adkins* case was to guarantee a wage based solely upon the necessities of the workers. * * * The statute did not provide for the wages to have any relationship to earning power; was applicable to all vocations and not to the character of the work. * * * As contrasted with this statute, the New York Minimum Wage Law provides a definite standard for wages paid. It provides that the worker is to be paid at least the value of the services rendered."

This is a difference in phraseology and not in principle. The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. The act of Congress had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the Congressional act. Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the *Adkins* case.

The distinctions between this case and the *Adkins* case are differences in details, methods and time; the exercise of Legislative power to fix wages in any employment is the same. We

should follow the law as given, and not speculate as to the changes which have come or are supposed to have come to economic conditions in the last decade which may move the Supreme Court to a further consideration of its ruling. The *Adkins* case has not been lightly passed over nor its rulings forgotten. It was cited and followed in *Wolff Company* v. *Industrial Court*, 262 U. S. 522; *Murphy, as Atty.-Gen.* v. *Sardell*, 269 U. S. 530; *Tyson* v. *Banton*, 273 U. S. 418; *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657; *Ribnik* v. *McBride*, 277 U. S. 350; and *Near* v. *Minnesota*, 283 U. S. 697.

When Minimum Wage Laws somewhat similar to our own have been challenged since the *Adkins* case the courts have felt bound by that decision to declare them unconstitutional without re-examination of the principles involved in those particular statutes (*The Topeka Laundry Co.* v. *The Court of Industrial Relations*, 119 Kan. 12; *Folding Furniture Works, Inc.* v. *Industrial Commission of Wisconsin*, 300 Fed. Rep. 991; *Stevenson* v. *St. Clair*, 161 Minn. 444; cf. *Holcombe* v. *Creamer*, 231 Mass. 99).

The order below must be reversed, the writ sustained, and the prisoner discharged, as Chap. 584 of the Laws of 1933, under which he is held, is unconstitutional according to *Adkins v. Children's Hospital*, 261 U. S. 525.

(O'Brien, Hubbs and Finch, JJ., concurred, with Crane, Ch. J.)

LEHMAN, J., *dissenting:*

The appellant is held in custody under an indictment. By writ of habeas corpus proceedings he challenges the legality of his commitment. The indictment charges, we are told, that the appel-

lant, as manager of the Spotlight Laundry, disobeyed a mandatory order, issued by the Industrial Commissioner under Article 19 of the Labor Law, commonly known as the minimum wage law for women and minors (Chapter 584 of the Laws of 1933) "prescribing certain minimum wages for certain adult women employees of the said laundry"; and that the appellant "conspired to make false entries in the time book of said laundry for the purpose of making it appear that the said adult women employees did in fact receive the amount of wages," ordered to be paid by the Industrial Commissioner. The wrong charged in the indictment finds its roots in the statute, and the appellant attacks the statute as unconstitutional and void. The State raises no objections to the form of the attack. It concedes that the appellant's detention is lawful only if the statute is constitutional. That is the only question presented upon this appeal.

Minimum wage laws, i. e., laws which require employers to pay to women and children employed by them a wage which shall not fall below a fixed minimum amount, have been enacted by many foreign countries; and, in the United States, sixteen states have enacted such statutes. So, also the Congress of the United States in 1918 provided for the fixing of minimum wages for women and children in the District of Columbia. 40 Stat. 964 c. 174. Such a statute constitutes a restriction on freedom of contract protected by the Fifth and Fourteenth Amendments of the Constitution of the United States. On that ground, the Supreme Court of the United States in *Adkins vs. Children's Hospital*, 261 U. S. 521, decided that the provisions of the Federal statute there challenged,

at least insofar as they applied to adult women, violated the constitutional limitation upon legislative power. We are told that under that decision and for the same reasons which induced the Supreme Court to declare the Federal Statute unconstitutional, we are bound to declare the New York statute void and unconstitutional.

There can be no doubt that the determination in that case that the Federal statute transcended the legislative power of Congress over the District of Columbia, made futile further argument that the statutes enacted by the various states, which were open to the same objections, should be sustained by the courts of those states. The Supreme Court of the United States must construe the provisions of the constitution and its definition of inviolate rights guaranteed by the constitution and of the division or restriction of powers thereunder must be accepted by all other courts of the country. A state court may previously have decided the same question. Such decision is of no effect after the Supreme Court of the United States has construed otherwise the constitution which binds all, and when the same question arises again in a state court it must follow the decision of the Supreme Court regardless of its own opinion. *Topeka Laundry Co.* vs. *Court of Industrial Relations*, 119 Kansas 12; *Stevenson* vs. *St. Clair*, 161 Minn. 444. Cf. *Sparks* vs. *Moritz*, 141 Wash. 417. The effect of the decision, there, is not measured by the persuasive force of the arguments which support it; for under any system of orderly administration of the law, it is the function of the court of last resort to pass finally upon the cogency of conflicting arguments and the weight of conflicting considerations. The

effect is not measured by the unanimity or lack of unanimity of the court, for the decision by a majority of one becomes the decision of the court. So Mr. Justice Holmes, who dissented forcibly in the *Adkins* case, bowed to the decision as a precedent and concurred on the ground alone in later decisions of similar purport *Murphy* vs. *Sardell*, 269 U. S. 530. Cf. *Donham* vs. *West-Nelson Manufacturing Co.*, 273 U. S. 657.

That does not mean, of course, that a court of last resort may not reconsider the same question when it is again presented, and then reach a contrary conclusion. In the light of wider experience, broader information or changed conditions, the weight that should, reasonably, be given to conflicting considerations may change and error may become manifest. A constitution may be amended only in manner provided therein, but a court which under the constitution is charged with the duty of construing the constitution may change its construction when convinced of error. That courts have not been willing to perpetuate a construction after they have been convinced of its unsoundness, has been a source of strength to our system of constitutional government. The Attorney-General, upon this appeal, argues that the statute now under consideration is free from the objections to the earlier "Minimum Wage" legislation, which the Supreme Court, in the *Adkins* case, held to be in violation of the provisions of the constitution; but urges, also, that time and experience have demonstrated the soundness of the dissenting opinions there, and that the Supreme Court would now decide differently if the same objections were presented. What the Supreme Court would now decide rests purely in

conjecture, and even though we should assume that a court might under any circumstances properly base decision upon such conjecture, we should certainly hesitate to venture upon such an uncharted and treacherous sea. We start our consideration of the validity of the statute here challenged upon the assumption that the construction placed upon the constitution by the decision of the Supreme Court in the *Adkins* case is open to attack only in that court. Our personal views of the soundness of that construction then become irrelevant, except insofar as they might, perhaps even unconsciously, dictate our conclusion as to how far such construction should be carried.

Article 19 of the Labor Law, which the appellant now attacks, provides, in section 552 that "It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an *oppressive and unreasonable wage* as defined in section five hundred and fifty-one of this article, and any contract, agreement or understanding for or in relation to such employment shall be null and void." The definition contained in section 551 is " 'an oppressive and unreasonable wage' shall mean a wage which is *both* less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health" (Italics are ours throughout this opinion.) The same section defines "a fair wage" as "a wage fairly commensurate with the value of the service or class of service rendered." The statute then provides for the manner in which a "minimum fair wage" shall be fixed in occupations where "any substantial number of women

or minors are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one" and the manner in which employers in such occupations may be induced or compelled to pay the "minimum fair wage" so fixed.

The statute is unquestionably a "price fixing" statute. Ordinarily the price paid for labor, like the price to be paid for goods, is determined by agreement of the parties primarily concerned. The right by agreement to fix prices, whether of labor or goods, is part of the freedom of which no person may be deprived without "due process of law." The attack upon the statute is directed mainly to the point that the state violates this constitutional guarantee whenever it attempts to fix a fair wage for adults who are fully competent to enter into contracts fixing wages at a price which they are willing to accept, rather than reject employment offered to them at such wages. Inextricably interwoven in that attack are objections based upon the method of fixing "minimum fair wages" and the effect of the enforcement of payment of such wages as provided in this statute. We postpone analysis of the provisions for fixing the "minimum fair wage" and for enforcement of payment, until we have determined the extent of the power of the state to interfere in any form or manner with the free exercise of the right by adults of competent mental ability to fix wages by contract.

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the exist-

ence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered." *Adkins vs. Childrens Hospital, supra.* Thus in the case upon which the appellant here relies, it was authoritatively held that the state under *exceptional* circumstances may place some restraint upon freedom of contract. The difference of opinion in the court concerned only the question of whether the circumstances were so exceptional as to justify, reasonably, the restraints imposed.

The general rules which govern consideration of the validity of a statute which restricts liberty of contract are, indeed, too well established to be challenged now. Liberty of contract is "subject to restrictions passed by the Legislative Branch of the Government in its exercise of this power to protect the safety, health and welfare of the people." *McLean vs. Arkansas,* 211 U. S. 539. "The guaranty of due process, as has been often held, demands only that the law shall not be unreasonable, arbitrary or capricious; and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia vs. People,* 291 U. S. 502. Liberty to fix by contract the price of labor does not differ in its nature from liberty to fix other terms and conditions of employment though, it may be conceded, that restriction there may encroach more seriously upon the essentials of our economic competitive system. Thus, perhaps, circumstances which might reasonably justify restrictions upon contracts in matters less vital might be insufficient here. Here, too, however, there are many instances where the state has been justified in imposing restrictions under its reserved police power to

legislate for the general welfare. The difference then is, at most, one of degree. "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other." *Home Building and Loan Association vs. Blaisdell*, 290 U. S. 398. It is with the background of these general rules that we must analyse the provisions of Article 19 of the Labor Law now challenged.

The Legislature in section 550 of that article has set forth the conditions which in its opinion called for the exercise of the reserved power of the state:

> "The employment of women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern. Many women and minors employed for gain in the state of New York are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory. Since a very large percentage of such workers are obliged from their week to week wages to support themselves and others who are dependent upon them in whole or in part they are, by reason of their necessitous circumstances,

forced to accept whatever wages are offered them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service rendered. Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the legislature this article is constitutional."

The appellant does not challenge these findings of fact by the Legislature, nor does he challenge the statements in the "factual brief" submitted

by the respondent to sustain and amplify these findings. Though no reasonable man, today, can doubt the mental capacity of women and though, happily, in this country there are few vestiges of the ancient law which discriminated between men and women and incapacitated women from entering upon independent industrial, business or professional careers, yet it is notorious that in the free competition of such careers they are at a disadvantage with men. The reason may be found in ancient prejudice, in custom, in training or in physical difference. Whatever may be the reason, the fact is patent that often women are willing or forced to accept lower compensation for service than men receive in the same occupation. If wages constitute a "fair and reasonable value of the services rendered, perhaps it would be arbitrary to require an employer to pay more, even though such wages be "less than sufficient to meet the minimum cost of living necessary for health." Cf. *Adkins vs. Childrens Hospital, supra.* If wages are *both* less than the "fair and reasonable value of the services rendered" *and* less than sufficient to meet the minimum cost of living necessary for health some element of inequality or oppression may reasonably be found to enter into the bargain.

From wages so fixed a vicious chain of results may follow. The health of the underpaid women suffers, or they must become a burden upon their families or communities. That is a matter which is certainly of public concern and which might well engage the attention of the Legislature. It is clearly unjust that an unscrupulous employer should obtain the services of his employees upon payment of wages "less than the

value of the services rendered" and that the community should bear the burden of his cupidity. True, not all employers who pay such inadequate wages are unscrupulous. In unrestrained competition an employer can seldom afford to increase his costs beyond those paid by his competitors. Thus if in any occupation a considerable number of persons are employed at "unreasonable and oppressive wages" by those willing to profit by the weakness of their employees, more scrupulous employers may be driven to pay the same wages. Competition, however desirable generally, becomes unfair when one employer by the use of practices which, though not unlawful, are unjust and injurious to his employees or to the public, can force his competitors to the wall or compel them to avail themselves of the same practices. It has been held in many cases that under such circumstances the Legislature may, within proper limits, restrain such practices. That is in the interest of true competition.

The vicious result of oppressive wages does not stop even with the underpaid wage earner. It extends throughout the industry and in lesser degree even beyond the industry. Labor which for one reason or another is deficient in bargaining power has come to be known as "cheap labor," that is, labor which fails to obtain wages commensurate with the value of the services rendered. Just as experience has shown that, in a community where peonage or slavery exists, free labor cannot flourish, so in an industry, or even community, where oppressive wages are paid to those deficient in bargaining power, it is not unreasonable to believe that such wages affect

indirectly but nevertheless very substantially the wages of all others. At least the Legislature might so find. It cannot then be gainsaid that the conditions which the Legislature found to exist call for some remedy. Indeed, the appellant does not seriously argue otherwise. The real question here presented is whether the remedy applied is rasonable and complies with the requirements of "due process, as defined by the Supreme Court, without which there may be no restriction upon liberty of contract.

Here, we may profitably examine the prevailing opinion in *Adkins* v. *Children's Hospital, supra,* to determine whether the statute now under consideration is subject to the objections which dictated the conclusion of the court in that case. In that case the statute provided for the fixing of standards of minimum wages for women in any occupation adequate "to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals." No other standard was there prescribed. It was there said that "while the physical differences (between men and women) must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris,* require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances." We accept that statement with all its implications.

The Legislature has then no greater power to restrict the liberty of women than of men. All

are equally entitled to the protection of the law, and, in regard to all, liberty of contract is the rule and restriction can be justified only by exceptional circumstances. What was said by the court can mean only that. None the less, just as in legislation in relation to health, the physical differences between men and women may properly be taken into account, so in legislation in other fields, the Legislature cannot reasonably be required to disregard actual conditions which affect women differently from men. The test in each case is whether the conditions justify the remedy regardless of whether those conditions affect men or women. Classification must of course be based upon actual conditions, not outworn theories of sex inferiority or superiority. In the *Adkins* case, the question was whether the Legislature could require an employer to pay minimum wages to women sufficient to maintain them in good health and to protect their morals, regardless of the value of the service rendered. The court held that such a requirement is unreasonable in its nature and not justified because it is confined to women. In this case the question is whether employers can be compelled to pay women wages which are not "oppressive." There is here no contention that the legislation is justified on the ground that the Legislature may restrict the liberty of women where it could not restrict the liberty of men. The Legislature has found that women are not "*as a class* upon a level of equality in bargaining with their employers in regard to minimum fair wage standards and 'freedom of contract' as applied to their relations with employers is illusory." Undoubtedly there is ground

for the belief that women are paid less than men in most occupations. That groups of men may also be paid "oppressive" wages may be entirely true. Perhaps they, too, should be protected by similar legislation. Upon that question we are not now called upon to pass. It is sufficient to point out that here the Legislature has not unlawfully discriminated between groups or sexes. Since it might reasonably be found that in the unrestrained play of economic forces, women as a class are at a disadvantage, with resultant injury to the general welfare, the Legislature might in its discretion adopt legislation, confined to them, which is reasonably adapted to meet the conditions peculiarly affecting them. The distinction is not based upon assumed need to protect the health or morals of women but upon the need of protecting the public against the evil of "oppressive" wage contracts imposed upon women because of economic conditions peculiarly affecting women. So in this case, as in the *Adkins* case, the fundamental question is whether the remedy is reasonable and appropriate.

In the *Adkins* case the court said that the law forbids "two persons having lawful capacity—under penalties as to the employer—to freely contract with one another in respect to the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee." That criticism might be applied to the earlier statute; it has no application here, for as we have shown,

the Legislature might reasonably find that acceptance of a contract for wages less than the reasonable value for services rendered and less than the minimum cost of healthful living must from its nature be induced by the necessities of the wage earner rather than by any opinion that the employment is "desirable." Then the court said: "The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment; and while it has no other basis to support the necessities of the employee, it takes no account of any independent resources she may have." Again, this objection does not apply to the statute now challenged. It has, as we have shown, other basis than the "necessities of the employee." Its basis is rather that wages which bear no fair relation "to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, the circumstances or surrounding of the employment"; in other words, relation to all those conditions might enter into the measure of fair compensation for the value of services, are not fair wages; and when in addition, they are insufficient to maintain the health of the employer, such wages are detrimental to the general welfare.

The next source of invalidity in the *Adkins* case is the uncertainty of the standard to be applied in fixing the minimum wages which must be made. There the formula to be applied was the "neces-

sary cost of living to any such women workers to maintain them in good health and to protect their morals." Here the formula to be applied *in fixing wages* is that of "a fair wage" as defined by the statute: *i.e.*, "a wage fairly and reasonably commensurate with the value of the service or class of service rendered." The necessities of the employee do not enter into that standard. True, under the statute, jurisdiction to fix fair wages is made dependent upon a finding that the wages paid to a substantial number of women or minors is "less than the minimum cost of living necessary to health," but even though, as the Supreme Court has pointed out, the necessary cost of living is not "a precise or unvarying sum," yet obviously there must be a point where determination with reasonable certainty is possible that wages paid are *less* than the necessary cost of living to maintain a woman in good health. Thus the objection to the standard in the statute considered in the *Adkins* case has no application here. We postpone consideration whether similar objections might be raised to the standards to be applied under the present statute until after we have completed analysis of the objections set forth in the opinion in the *Adkins* case.

It is further said in that opinion that "the law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course the privilege of abandoning his business as an alternative for

going on at a loss. * * * It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the other policy of the legislation, though in practice the former half without the latter must lead to ultimate failure in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole."

Here we reach the crux of the objections, which in the opinion of the Supreme Court, rendered the earlier statute arbitrary and unreasonable and here, too, it is evident that the Legislature, in the new statute, recognized, these objections and sought to provide a remedy which should be free from them. Assuming that it is possible to measure in accordance with the provisions of the statute the "value of the service or class of service" rendered, it is clear that a requirement that the employer shall not be permitted to pay less than such value does not "compel the employer to pay a sum which the employee is not

capable of earning nor can it fairly be said that the law compels payment irrespective of the ability of the business to bear the burden, for with the exception perhaps of a business which can exist only through practices which are unfair and economically unsound, a business must ordinarily be able to bear the burden of paying fair compensation for service given to the business. An employer who pays wages less than that, and less than the cost of healthful living, places upon society the burden of paying part of the legitimate costs of the business.

That these differences are vital appears from the opinion itself in the *Adkins* case, for it continues: "The feature of this statute which perhaps more than any other puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business or the contract or the work the employee engages to do. The declared basis, as already pointed out, is *not the value of the service rendered*, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals." The exact opposite is true in this case. "The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered, shall bear to each other some relation of just equivalence, is completely ignored" in the earlier statute. It is not ignored here. Indeed what the statute aims to do is to declare that "the moral requirement implicit in every contract of employment" cannot be excluded by agreement of parties where

through such exclusion the general welfare may suffer. Indeed, the court went further in the *Adkins* case and expressly pointed out that a statute like the one under consideration might not be subject to the objections there held insuperable, saying: "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, *to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service,* would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States."

We have assumed so far that the provisions for fixing wages are fair and provide a standard which can be applied by administrative officers. That assumption must now be tested by analysis of the statute itself. The statute does not require that every employer shall pay a minimum "fair" wage, nor that at his peril and to avoid criminal prosecution, any employer must determine what is a "fair" wage. An employer must pay such a wage only where such a wage has been fixed for a particular service or class of service in a particular industry by administrative order, and where a further order has been made requiring employers in that industry to pay the minimum wage so fixed. Such an order may be made only when, on the basis of information in the possession of the industrial commissioner or the director of the minimum wage bureau, the commissioner is

of opinion that "any substantial number of women or minors in any occupation or occupations are receiving oppressive and unreasonable wages as defined in section 551." Even then he may not proceed summarily to make an order fixing wages, but must "appoint a wage board to report upon the establishment of minimum fair wage rates for such women or minors in such occupation." Section 554.

The minimum wage board must be composed of not more than three representatives of the employers in any occupation or occupations, an equal number of representatives of the employees in such occupation or occupations and not more than three disinterested persons representing the public. "Within sixty days of its organization a wage board shall submit a report including its recommendation as to minimum fair wage standards for women or minors for the occupation or occupations, the wage standards of which the wage board was appointed to investigate." Section 555. That means "a wage fairly commensurate with the value of the service or class of service rendered. In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3)

may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards." (Section 551.)

It is said that the standard of fair value of services is too indefinite for accurate application. It is true that value is ordinarily determined by competitive agreement, and here, it is plain, the board is required to fix a value different from the value fixed by such agreement. Courts and juries are at times required to fix values when there is no market price, and many price-fixing statutes have been sustained in occupations affected by a public interest, though there, too, the same difficulty may exist. The difficulty is met if some reasonable basis exists for fixing wages. Before a report of the wage board becomes effective there must be a public hearing, and only when the commissioner, after such hearing, has approved, can any order be made fixing the "fair wage." (Sections 556 and 557). Even then the order remains only directory for nine months. It can be made mandatory thereafter, but only upon a new public hearing. (Section 560.) At any time after an order fixing such wages, whether directory or mandatory, has been in effect a year, there must be a reconsideration of the wage upon the petition of fifty or more residents of the state. (Section 562.) In addition there is a right of review by the Industrial Board, and the courts, "from any ruling or holding on a question of law included and embodied in any decision or order of the commissioner or the director. (Section 563.) and upon such review the reasonableness of any rule or order may be challenged. Labor Law Article 3.

An order so made seems to comply in all respects with constitutional requirement. The Legislature has set a standard which must guide the administrative officers. Though the standard cannot be applied mechanically, it is sufficient in most cases to admit of conclusions reasonably drawn from the evidence presented and which can be tested by application of rules of reason. The statute provides a hearing to all persons affected and a judicial review of the reasonableness of the conclusions drawn. There may, quite possibly, be exceptional cases where no evidence can be produced, from which any conclusion can logically be drawn. Then any person may attack the reasonableness of the finding. No such attack is here made, and an examination of the report of the wage board shows ample evidence to support its conclusion.

Doubtless in the application of the statute injustice to individuals may at times arise. Argument may be made that economic wrongs are but corrected by the free play of economic forces. Doubtless that consideration has dictated the conclusion of the courts in many cases where statutes restricting competition have been declared unconstitutional. Our economic system is based upon competition, and when we say liberty of contract is the rule and restriction can be justified only by exceptional circumstances, we probably mean just that. None the less, restrictions within reasonable limits and upon reasonable grounds are justified, and so long as the Legislature does not exceed those limitations it must determine whether the price that must be paid for restrictions is overbalanced by the results that may reasonably be

expected from such restrictions. It is said that if the court permits the fixing of minimum prices, it must also permit the fixing of maximum prices. The problem is not so simple. We hold only that in this case the Legislature might reasonably fix minimum prices for women because within the limited field covered by the statute some employers have taken advantage of the economic weakness of women to the public injury. Competition there, it has been found, has been at times illusory, and at times unfair and has worked injury to the general welfare. Whether a law fixing maximum prices could ever be justified by circumstances so compelling as to render the law reasonable is not involved. Price fixing by free contract must remain unrestrained so long as it does not injure the public welfare. In each case the test is whether the restriction is justified and in conformity to "due process."

Here it may be interesting to observe that in this case no employer or employee has challenged the fairness of the wage fixed or claims it may result in injustice. The wage board agreed unanimously upon the amount of a fair wage in the laundry industry. No person appeared at the public hearings to object to the wage so fixed. No person sought a review of the order by appeal to the Industrial Board. The order has been in force for several years and there has been no application for a reconsideration. Even upon this appeal, a brief in support of the law has been filed by a trade association of owners of laundries, and the only person attacking the law is the appellant who has been charged with concealment of disobedience of the law by false entries. In such circumstances it can hardly be said that at least insofar as concerns the laundry business,

the statute or the wage fixing order is unfair or unreasonable. When orders are issued fixing wages of women in other occupations the courts may be called upon to decide whether they are reasonable and justified by the evidence.

We are told that this statute, though enacted primarily for the protection of women, may eventually result in injury to them; for some employers may prefer to employ men if they can obtain male employees for less wages than the law requires for women employees. That adult male employees of equal efficiency can be obtained at less than the minimum wage fixed for women and minors is contrary to common experience and contrary to the findings of the Legislature. Under these circumstances, that objection is one which the Legislature might reasonably disregard. If in truth it should appear that any substantial number of men have because of price fixing orders supplanted women in any industry, that might be convincing evidence that the orders were unreasonable. No such contention has been made by the appellant.

We are further told that such orders may work hardship to industries in some districts. The statute has provided against that:

> "5. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality."

It is argued that the differentiation is permissive, not mandatory. That may be true, but a permissive right to differentiate becomes mandatory where failure to exercise it would be unreasonable. There as elsewhere the judgment of the board is subject to judicial review.

We have considered all the objections urged by the appellant or which have occurred to us, though perhaps the consideration of some of these objections rests exclusively with the Legislature. Doubtless some persons may suffer hardship. There may be some women replaced by other women of greater efficiency. Some business, which are economically unsound, may be discontinued. Such individual hardships may be the result of any restriction upon competition, but greater hardships of the same kind may be the result also of unrestricted competition, especially where that competition is tainted with overreaching or other unfair practices. The Legislature doubtless weighed these objections, they are not so weighty that a court should say the Legislature could not reasonably find that they are overbalanced by countervailing anticipated benefits.

Can such a statute be declared unconstitutional by the courts? The conditions which the Legislature seeks to remedy are not imaginary. The Legislature might reasonably find that they are caused by oppressive exercise of liberty of contract, and that removal of such conditions is necessary for the general welfare. The remedy devised is reasonably calculated to end those conditions, though perhaps the remedy may carry in its train other evils. The remedy is on the whole not unfair to employers or to employees;

though individuals may suffer hardship. Other countries with traditions similar to our own have adopted remedies more drastic to meet analogous conditions. The restriction upon liberty of contract is directed against a harmful and perhaps unfair use of that liberty. The constitutional limitations upon legislative power must be enforced by the court, but they may not be extended beyond their fair meaning. Liberty of contract, like other forms of liberty, must be zealously guarded against invasion by the state, but fear that in the future the state may encroach by unreasonable legislation upon the liberties of the individual cannot justify a present limitation upon the powers of the state, not expressed or clearly implicit in the Constitution. Liberty may be reasonably restrained upon grounds of general welfare. Courts must decide each case upon the facts there presented; upon the facts presented in this case we do not find any ground for saying that the Legislature has acted arbitrarily or transcended the limitations upon its powers.

Order should be affirmed with costs.

(CROUCH and LOUGHRAN J. J. concurred with LEHMAN, J.).

APPENDIX C

COURT OF APPEALS

State of New York, } ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of March, in the year of Our Lord One Thousand Nine Hundred and Thirty-Six, before the Judges of said Court.

Witness:

THE HON. FREDERICK E. CRANE,
Chief Judge, Presiding.

WILLIAM J. ARMSTRONG,
Clerk.

REMITTITUR—March 4th, 1936.

PEOPLE EX REL. JOSEPH TIPALDO,
Relator-Appellant,

against

FREDERICK L. MOREHEAD, as the Warden of the City Prison, in the Borough of Brooklyn,
Respondent.

Be it remembered, that on the 6th day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-Five, Joseph Tipaldo, the appellant in this cause, came here into the Court of Appeals by Goldberg & Levitt, his attorneys, and filed in the said Court a Notice of

Appeal and return thereto from the order of the Supreme Court, Kings County, and Frederick L. Morehead, as Warden of the City Prison, in the Borough of Brooklyn, the respondent in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney General.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed. The Court of Appeals having heard this cause argued by Mr. Nathan L. Miller, of counsel for the appellant; and by Mr. Henry Epstein, for the respondent; and by Mr. Charles J. Campbell, for New York State Hotel Association, as *amicus curiae;* brief filed by other *amici curiae;* and after due deliberation had thereon, did order and adjudge that the order of the Supreme Court appealed from herein be, and the same hereby is, reversed, the writ sustained and the prisoner discharged. A question under the Federal Constitution was presented and necessarily passed upon by this Court, viz: that Chapter 584 of the Laws of 1933 of the State of New York contravenes the Fourteenth Amendment of the Constitution of the United States. This Court held that the aforesaid statute does contravene the Fourteenth Amendment of the Constitution of the United States (*Adkins* v. *Children's Hospital,* 261 U. S. 525).

And it was also further ordered that the record aforesaid and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed, the writ sustained and the prisoner discharged, etc., as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, be it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided to be enforced according to law and which record now remains in the said Supreme Court before the Justices thereof, etc.

JOHN LUDDEN (Signed),
Deputy Clerk of the Court of Appeals of the State of New York.

Court of Appeals,
Clerk's Office,
Albany, March 4th, 1936.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein; attached thereto.

JOHN LUDDEN,
Deputy Clerk.

(Seal)

At a Special Term, Part II of the New York Supreme Court, held in and for the County of Kings, at the County Court House, in the Borough of Brooklyn, City of New York, this 6th day of March, 1936.

Present:

HON. PETER P. SMITH,
Justice

PEOPLE EX REL JOSEPH TIPALDO,
Relator-Appellant,

against

FREDERICK L. MOREHEAD, as the Warden of the City Prison in the Borough of Brooklyn,
Respondent.

The above named Relator having appealed to the Court of Appeals from the order made by the Hon. Mitchell May on July 3rd, 1935, and entered in the office of the Clerk of the County of Kings, on the said day, whereby the above entitled habeas corpus proceeding was dismissed, and the Court of Appeals having heard said appeal, and ordered and adjudged that the order so appealed from be reversed, the writ of habeas corpus sustained and the Relator discharged from custody, and the record remitted from that Court, having been filed, from which it appears that a question under the Federal Constitution was presented and necessarily passed upon by the Court of Appeals, viz, that Chapter 584, Laws of 1933 of the State of New York contravenes the 14th

Amendment of the Constitution of the United States and that the Court of Appeals held that the aforesaid statute does contravene the 14th Amendment of the Constitution of the United States (*Adkins* v. *Children's Hospital,* 261 U. S. 525).

Now, on motion of Gates & Levitt, attorneys for the Relator, it is

Ordered, that the said judgment of the Court of Appeals be and the same is hereby made the judgment of this Court.

Enter

PETER P. SMITH,
J. S. C.

Granted March 6, 1936.

JOHN N. HARMAN,
Clerk.

State of New York }
County of Kings } *ss.:*

I, John N. Harman, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record) do hereby certify that I have compared the annexed with the original Order filed in my office March 7, 1936, and that the same is a true transcript thereof and to the whole of said original.

(For Attorney General. No fee).

In testimony whereof, I have hereunder set my hand and affixed the seal of said County and Court this 9th day of March, 1936.

JOHN N. HARMAN,
Clerk.

[Seal.]

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE EX REL. JOSEPH TIPALDO,

Respondent.

SIRS:

Please take notice that the annexed motion to advance will be presented to the Supreme Court of the United States, at Washington, D. C., on presentation of the accompanying petition for a writ of certiorari.

Dated, March 10, 1936.

Yours, etc.,

JOHN J. BENNETT, JR.,
Attorney-General, State of New York,
Attorney for Petitioner.

HENRY EPSTEIN,
Solicitor General, State of New York,
Of Counsel.

To:

GATES AND LEVITT, ESQS.,
Counsel for Respondent, Tipaldo.

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE EX REL. JOSEPH TIPALDO,

Respondent.

MOTION TO ADVANCE

Petitioner moves that this cause be advanced for an early hearing and prays that this motion be considered together with petition for certiorari in this cause.

In support hereof petitioner makes the following brief statement of the matters involved and the reasons for the speedy determination sought hereby.

The question presented is the validity under the United States Constitution of the New York State Minimum Wage Law (Chap. 584, Laws 1933 of New York). For two years the said law has functioned. There is in the Department of Labor of New York State a division devoted to the inquiry into and enforcement of the provisions of this law. Appropriations have been included

in the present budget to provide for personnel and other expenses. Those expenditures are authorized from the first day of July, 1936, when the fiscal year 1936-1937 begins. It is thus a matter of vital concern to the State of New York, to the persons whose employment may thus be involved, as well as to those industries affected, that a speedy ruling be had.

The immediate concern, however, is that of the State of New York and of its Department of Labor.

Dated, March 11th, 1936.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney-General, State of New York,
Attorney for Petitioner.

HENRY EPSTEIN,
Solicitor General, State of New York,
Of Counsel.

The undersigned, counsel for respondent Tipaldo, join in the above application and motion to advance this cause for early hearing.

Dated, March ..., 1936.

GATES AND LEVITT,
Attorneys,
Counsel for Respondent, Tipaldo.